REGION VIII.—DELEGATION STATUS OF NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS [1]—Continued

Subpart	CO	MT [2]	ND [2]	SD [2]	UT [2]	WY
FF Benzene Waste Operations	.....	*	*	.....	*	

*Indicates approval of delegation of subpart to state.

[1] Authorities which may not be delegated include 40 CFR 61.04(b), 61.12(d)(1), 61.13(h)(1)(ii), 61.112(c), 61.164(a)(2), 61.164(a)(3), 61.172(b)(2)(ii)(B), 61.172(b)(2)(ii)(C), 61.174 (a)(2), 61.174(a)(3), 61.242–1(c)(2), 61.244, and all authorities listed as not delegable in each subpart under Delegation of Authority.

[2] Indicates approval of National Emission Standards for Hazardous Air Pollutants as part of the State Implementation Plan (SIP) with the exception of the radionuclide NESHAP Subparts B, Q, R, T, W which were approved through Section 112(l) of the Clean Air Act.

[3] Delegation only for asbestos demolition, renovation, spraying, manufacturing, and fabricating operations, insulating materials, waste disposal for demolition, renovation, spraying, manufacturing and fabricating operations, inactive waste disposal sites for manufacturing and fabricating operations, and operations that convert asbestos-containing waste material into nonasbestos (asbestos-free) material.

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48 CFR Parts 1516 and 1552

[FRL–5282–5]

Acquisition Regulation; Cost-Plus-Award Fee Contracts

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This document revises the EPA Acquisition Regulation (EPAAR) coverage on cost-plus-award fee (CPAF) contracts. The rule is necessary to update and clarify EPA policy regarding CPAF contracts, and to give Contracting Officers (COs) greater flexibility in tailoring award fee plans to individual contracts.

EFFECTIVE DATE: October 20, 1995.

FOR FURTHER INFORMATION CONTACT: Environmental Protection Agency, Office of Acquisition Management (3802F), 401 M Street SW, Washington, DC 20460, Attn: Louise Senzel (202) 260–6204.

SUPPLEMENTARY INFORMATION:

A. Background

The proposed rule was published in the **Federal Register** (60 FR 5888) on January 31, 1995, providing for a 30-day comment period. The comment period was extended by publication in the **Federal Register** (60 FR 10535) on February 27, 1995, for an additional 30 days.

Interested persons have been afforded an opportunity to participate in the making of this rule. Due consideration has been given to the 14 comments received. The following is a summary of each comment received and the Agency's disposition of these comments.

1. The commentary accompanying the proposed rule says that the intent is to encourage contractors to perform at the ''above satisfactory'' or ''excellent'' levels. While this is an admirable intent, there is no logical reason to provide no reward at all for ''satisfactory'' performance. EPA should study FAR 15.901 (b) and (c).

The Agency is aware of the intent of profit as described in FAR subparts 15.901 (b) and (c). Contractors that perform on a ''satisfactory'' basis will still receive base fee. The Agency policy is that there is no award fee for this level of performance. The Agency is creating a greater incentive for high quality performance. Rewarding work that is satisfactory will not achieve this goal.

2. The proposed rule makes no connection between the ratings (frequently determined by averaging inputs from EPA field personnel, who are the real ''customers'' of the contract) and the award fee. Thus, there would be no accountability for those making award fee decisions. The proposed rule is an incentive to take advantage of a contractor rather than working to establish a long-term win-win relationship. This is a bad approach to business and a worse approach to government.

Agency internal procedures set forth the process for performing award fee evaluations, and describe the relationship between the ratings of field personnel and the award fee. However, EPA does not believe that it is necessary to describe the details of our internal processes which establish accountability, in the EPA Acquisition Regulation. The EPA disagrees that the rule is an incentive to take advantage of a contractor. The proposed rule represents the intent of the National Performance Review which calls for elimination of unnecessary rulemaking for internal procedures and practices, and focuses on outcomes not processes.

3. What is the purpose of high ratings and low award fee? If the ratings and award fee are not correlated to each other, to what *do* they correlate? This approach sends the message to the contractor that the award fee process is subjective, rather than objective.

The EPA does not believe that there will be high ratings and low award fee. The EPA will pay equivalent fee for the rating received. Award fee is an objective process that requires subjective review of the quality of a contractor's performance. No matter how objectively and well the process parameters are described, the process must still rely on the qualitative judgment of the reviewers in assessing a rating for the contractor's performance.

4. The proposed rule would allow EPA to make unilateral changes to the award fee plan after contract award. Thus, performance would not be evaluated on the same basis that enticed submission of a proposal. This is ''bait and switch'' at its worst. There would be no appeal of these changes.

The award fee process always permitted the Government to make unilateral changes to the award fee plan after contract award. However, this is not ''bait and switch'' as the rule will require the contractor to be notified at least 30 days in advance of the basis for determining award fee. Generally, the practice has been to prospectively amend the award fee plan, i.e., the new plan will impact the activities performed after the change in plan and will not apply retroactively to work already performed.

5. EPA seems to believe that contractors look at base fee and award fee as a single number, so that if a contractor received zero award fee out of a (3% pool) and 3% base fee, it received 50% of the available fee. This is inconsistent with the FAR approach to fee and is ''logic'' not subscribed to by any contractor.

This is not what EPA believes. EPA believes that award fee should not be given for work that is satisfactory or less. EPA believes that to award ''satisfactory'' work will provide a negative incentive for contractors to perform at higher levels of performance.

6. Government work is already less profitable than other work. A typical

CPAF contract has a 7% fee (3% base and 4% award), but that is *before:* award fee ratings; award fee erosion due to level of effort; unallowable costs; late payment (EPA ignores the Prompt Payment Act); arbitrary withholdings, etc. Commercial work profit ranges of 10–30% are typical, with little paperwork and few hassles. Reducing the likelihood of earning award fee is not the way to attract the highest qualified contractors. By removing the financial incentives to participate, the proposed rule will drive away innovative and higher qualified contractors at just the time EPA needs them most.

Primarily, commercial work is performed on a fixed price basis not a cost reimbursement one. Typically, Government fixed price contracts have much higher profit/fees than cost reimbursement work. Fee on cost reimbursable contracts is currently limited statutorily. Other Federal agencies use these same limits. The EPA believes that by awarding high performance, the Agency will continue to attract highly qualified contractors who are capable and interested in performing work in support of our environmental mission. EPA's payment record under the Prompt Payment Act is exemplary. Although an award fee determination may be late, this is not a violation of the Prompt Payment Act.

7. While the words of the proposed rule emphasize quality, the numbers (and EPA's consistent behavior) emphasize price.

The Agency has previously instituted policy to ensure that there is a floor for award fee to ensure that there is an appropriate size award fee pool even in a competitive acquisition.

8. The EPA award fee process needs to be re-thought, but the proposed rule is a giant step in the wrong direction.

The EPA believes that this is a step in the right direction to incentivize contractor performance.

9. For the rating levels of ''unsatisfactory'', ''satisfactory'', ''above satisfactory'', and ''excellent'', specific rating factors or criteria must be spelled out under EPAAR 1516.4 since the rule provides for *unilateral* contract modification of the Award Fee Plan. Spelling out specific rating factors or criteria would minimize the risk of unwarranted or unfair *subjectivity* on the part of individuals involved or responsible for performance evaluations and ratings. Also, it would make it clear to contractors what is expected in order to achieve the rating levels. Furthermore, it would assure consistency in the administration of the rating scheme, rather than leaving it to individual discretion and/or case by case variances. The award fee is to be considered an *incentive* to motivate performance for *mutual* benefit with a sense of partnership between the Agency and the contractor to help achieve the Agency's program goal, in the public interest (FAR 16.404–2(b)(2). ''* * * The criteria and rating plan should motivate the contractor to improve performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas''.)

The recommended guidance for rating levels and factors are included in proposed Agency internal guidance procedures. However, there will be some latitude on the part of the drafters of an individual acquisition to tailor the process to meet the needs of the specific requirement. Additionally, the specific information regarding rating factors or criteria will be spelled out in detail in the award fee plan which is part of the contract. This will notify contractors as to the basis and methodology for evaluation of their performance.

10. The Award Fee Rule must also provide for full disclosure of not only the numeric ratings in the Award Fee Plan but, more importantly, the actual ratings and bases to the contractor, for both program management and technical performance. Furthermore, it should provide for an administrative review process prior to the Fee Determination Official's (FDO) determination, in addition to contractor self-evaluation, inasmuch as the proposed rule indicates that the FDO's determination is not subject to appeal under the Disputes clause. Oral debriefings of the ratings by the Contracting Officer (CO) alone do not do full justice to this *unilateral* process.

The award fee plan will identify the ratings and bases for evaluation. The plan will also identify the manner in which the award fee process will be carried out. Agency internal guidance outlines the process to be followed. However, there must be latitude for exercise of discretion to tailor processes to meet the needs of specific acquisitions. There is nothing that limits the CO to provide solely oral debriefings on contractor performance. The award fee notice should provide ample information for the contractor to understand the basis for the award fee determined. Additionally, the CO may choose to provide additional debriefings with the assistance of the Project Officer or any other individuals that the CO wishes to assist.

11. The proposed rule does not indicate when the earned award fee shall be authorized to be paid. The rule must include a payment authorization period such as within sixty (60) days after the last day of the performance period.

Agency internal guidance provides procedures to be followed when using the award fee process. The contractor will be notified of timeframes in the award fee plan.

12. In relation to 1552.216–70(b), if and when the FDO disregards or otherwise takes exception to the Performance Evaluation Board's (PEB) assessment of the quality of contractor performance and reduces the recommended fee, the FDO must indicate the reasons thereof to the contractor.

The purpose of the award fee modification is not only to provide the amount of fee awarded, but also to provide an understanding to the contractor of the evaluation of the quality of their performance. The Agency is interested in notifying contractors what they are doing well and in what areas they need to improve performance. The FDO would focus on the total evaluation of the contractor's performance, not necessarily on the difference between contractor's or PEB award fee recommendations.

13. The rule should define the duration of Performance Period. In view of the Agency's unilateral policy shift to not award fee for ''satisfactory'' performance level (albeit it is regarded by the Agency as a motivation factor for improved performance) and the resulting additional risk of loss of fee, the period of performance should revert back to *trimester* from the current semester system thereby affording opportunities to the contractor to demonstrate improvement on a more frequent performance review basis.

The contract amount, performance period, and expected benefits must be sufficient to warrant the additional administrative effort and cost associated with CPAF contracts. The EPA recognizes that award fee evaluations should be conducted as often as reasonable to provide contractors with the maximum amount of feedback on performance and create the greatest amount of incentive for high quality performance. However, the cost of the process should never outweigh the value of the feedback. Agency internal procedures recommend timeframes for performing award fee evaluations and stress the importance of timely processing of these modifications. The individual acqusition should determine the frequency of evaluations.

14. Under 1516.404–271, the effective date of applicability should be indicated. Also clarification is needed

whether it is the Agency's policy intent to unilaterally modify existing CPAF contracts and those that are under evaluation but not yet awarded.

The rule will apply to all solicitations for CPAF contracts issued after the effective date of the rule. It does not apply to exercise of options for contracts awarded prior to the implementation of the rule. The Agency does not intend to unilaterally modify existing contracts nor those that are under evaluation, but not yet awarded.

EPA has not changed the final rule from the proposed rule as a result of these comments. This rule replaces Sections 1516.404–270 through 1516.404–274 and deletes 1516.404–275 through 1516.404–2710 of the EPAAR. EPA has determined that codification of the Agency's procedures for the award fee process is unnecessary since these procedures are internal to EPA. Consequently, EPA will include these internal procedures in an Agency Directive. Internal procedures are those which encompass any aspect of preparing, establishing, modifying, and administering the award fee plan. The revised EPAAR only states the Agency's general policy and objectives in using award fee contracts.

Award fee may be earned only when the contractor's performance is rated above satisfactory or excellent. No award fee may be earned if performance is rated satisfactory or unsatisfactory. This approach to cost-plus-award-fee contracts is designed to motivate contractors to achieve excellent performance and to improve cost-plus-award-fee contracting at EPA.

Section 1516.405 is revised and Section 1552.216–75 is added to address base and award fee limitations in accordance with the FAR. Section 1552.216–70 is revised to clarify EPA's policy on the payment of fee under CPAF contracts.

B. Executive Order 12866

This is not a major rule as defined in Executive Order 12866; therefore, no review was required by the Office of Management and Budget (OMB).

C. Paperwork Reduction Act

The rule does not contain any recordkeeping or information collection requirements that require the approval of OMB under 44 U.S.C. 3501 et. seq.

D. Regulatory Flexibility Act

The rule will not have an impact on small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. since it does not impose any new requirements for compliance on contractors, large or small. The EPA certifies that this rule will not impact small entities. Therefore, no regulatory flexibility analysis has been prepared.

List of Subjects in 48 CFR Parts 1516 and 1552

Government Procurement.

For the reasons set out in the preamble, Parts 1516 and 1552 of Title 48 of the Code of Federal Regulations are amended as set forth below:

1. The authority citation for Parts 1516 and 1552 continues to read as follows:

Authority: Sec 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

2. Subpart 1516.4 is amended by revising Sections 1516.404–270 through 1516.404–274 to read as follows and by removing Sections 1516.404–275 through 1516.404–2710.

1516.404–270 Scope.

This subsection establishes the EPA policy for cost-plus- award-fee (CPAF) type contracts.

1516.404–271 Applicability.

Contracting Officers shall consider all contract actions conforming to the limitations of FAR 16.404–2(c) as candidates for award as a CPAF contract.

1516.404–272 Definitions.

(a) *Performance Evaluation Board (PEB).* Group of Government officials responsible for assessing the quality of contract performance and recommending the appropriate fee.

(b) *Fee Determination Official.* Individual responsible for reviewing the recommendations of the PEB and making the final determination of the amount of award fee to be awarded to the contractor.

1516.404–273 Limitations.

(a) No award fee may be earned if the Fee Determination Official determines that contractor performance has been satisfactory or less than satisfactory. A contractor may earn award fee only for performance rated above satisfactory or excellent. All award fee plans shall disclose to offerors the numerical rating necessary to be deemed ''above satisfactory'' or ''excellent'' for award fee purposes.

(b) The base fee shall not exceed three percent of the estimated cost of the contract, exclusive of the fee.

(c) Unearned award fee may not be carried forward from one performance period into a subsequent performance period unless approved by the FDO.

(d) The payment of award fee on a provisional basis is not authorized.

1516.404–274 Waiver.

The Chief of the Contracting Office may waive the limitations in paragraphs (a), (b), and (d) of 1516.404–273 on a case-by-case basis when unusual or compelling circumstances exist. The waiver shall be supported by a justification and coordinated with the Procurement Policy Branch in the Office of Acquisition Management.

3. Section 1516.405 is revised to read as follows:

1516.405 Contract clauses.

(a) The Contracting Officer shall insert the clause at 1552.216–70, Award Fee (SEPT 1995), in solicitations and contracts when a cost-plus-award-fee contract is contemplated.

(b) The Contracting Officer shall insert the clause at 1552.216–75, Base Fee and Award Fee Proposal (SEPT 1995), in all solicitations which contemplate the award of cost-plus-award-fee contracts. The Contracting Officer shall insert the appropriate percentages in accordance with FAR 15.903(d).

4. Section 1552.216–70 is revised to read as follows:

1552.216–70 Award Fee.

As prescribed in 1516.405(a), insert the following clause:

Award Fee (Sept 1995)

(a) The Government shall pay the contractor a base fee, if any, and such additional fee as may be earned, as provided in the award fee plan incorporated into the Schedule.

(b) Award fee determinations made by the Government under this contract are unilaterally determined by the Fee Determination Official (FDO) and are not subject to appeal under the Disputes clause.

(c) The Government may unilaterally change the award fee plan at any time, via contract modification, at least thirty (30) calendar days prior to the beginning of the applicable evaluation period. Changes issued in a unilateral modification are not subject to equitable adjustments, consideration, or any other renegotiation of the contract.

(End of Clause)

5. Section 1552.216–75 is added to read as follows:

1552.216–75 Base Fee and Award Fee Proposal.

As prescribed in 1516.405(b), insert the following clause.

Base Fee and Award Fee Proposal (Sept 1995)

For the purpose of this solicitation, offerors shall propose a combination of base fee and award fee within the maximum fee limitation of _____% as stated in FAR 15.903(d). Base fee shall not exceed 3% of the estimated cost,

excluding fee, and the award fee shall not be less than _____% of the total estimated cost, excluding fee. The combined percentage of base and award fee does not exceed _____% of the total estimated cost, excluding fee.

(End of Clause)

Dated: August 7, 1995.

Jeanette Brown,

Acting Director, Office of Acquisition Management.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 23

RIN 1018–AC72

Export of American Alligators Taken in 1995 Through 1997

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulates international trade in certain animal and plant species. As a general rule, exports of animals and plants listed on Appendix II of CITES may occur only if a Scientific Authority has advised a permit-issuing Management Authority that such exports will not be detrimental to the survival of the species and if the Management Authority is satisfied that the animals or plants were not obtained in violation of laws for their protection. Based on documentation presented for consideration by the CITES Parties in 1983, the U.S. Fish and Wildlife Service (Service) has determined that the American alligator is listed on Appendix II for reasons of similarity in appearance under Article II.2(b) of CITES as well as the potential threat to the species survival under CITES Article II.2(a).

On December 27, 1994, the Service published a notice (59 FR 66510) proposing to grant export approval for legally taken American alligators, alligator meat, parts, and products from previously approved States for the 1995–1997 harvest seasons.

This document announces the final findings and rule by the U.S. Scientific Authority and Management Authority that approve the export of American alligators harvested during the 1995–1997 harvest seasons from certain States previously approved for such export for the 1992–1994 harvest seasons and for the State of Arkansas which was previously approved for the 1994 harvest season. This rule also stipulates that monitoring procedures previously established for this species be continued.

In addition, references in the regulation concerning the manner in which tags are to be attached to American alligator hides (full skins) at the time of export and the conditions for export of parts and products have been clarified.

EFFECTIVE DATE: August 21, 1995.

FOR FURTHER INFORMATION CONTACT: Scientific Authority: Dr. Charles W. Dane, Office of Scientific Authority, Mail Stop: ARLSQ, Room 725, U.S. Fish and Wildlife Service, Washington, DC 20240; telephone (703) 358–1708; fax number (703) 358–2276.

Management Authority: Carol L. Carson, Office of Management Authority, U.S. Fish and Wildlife Service, Room 420–C, 4401 N. Fairfax Dr., Arlington, Virginia 22203; telephone (703) 358–2095; fax number (703) 358–2280.

SUPPLEMENTARY INFORMATION: Since 1977, the Service has employed the rulemaking process to develop and issue decisions on the export of certain species under CITES. The reason for this approach is that it is more effective to issue general decisions on the export of all specimens of a species harvested in a given State and season than to issue such decisions separately for each permit application. This is especially true for CITES Appendix II species that are frequently exported, such as the American alligator. On May 26, 1992 (57 FR 21896), the Service published rules granting export approval for American alligators (*Alligator mississippiensis*) from specified States for the 1992–1994 harvest seasons. Subsequently, based on advice from the Office of Scientific Authority and the Office of Management Authority, the Service also approved the export of farm-raised American alligators from the State of Arkansas for the 1994 harvest season. The purpose of this announcement and rule is to allow the export of legally taken American alligators (hides, meat, parts, and products) for the 1995–1997 harvest years from previously approved States.

Scientific Authority Findings

Article II, paragraph 2, of CITES establishes that Appendix II shall include:

''(a) All species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulations in order to avoid utilization incompatible with their survival; and

(b) Other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.''

The American alligator is listed in Appendix II to respond both to problems of potential threat to the survival of the species [CITES Article II.2(a)] and of the similarity of appearance to other crocodilians that are threatened with possible extinction [CITES Article II.2(b)]. Article IV of CITES requires that an export permit for any specimen of a species included in Appendix II shall only be granted when certain findings have been made by the Scientific Authority and Management Authority of the exporting country. The marking of hides with specified tags, the marking and documentation of shipments of meat and parts, and the issuance of export permits specifically for American alligator parts and products are considered sufficient to address the issue of identification due to similarity of appearance between American alligators and other listed crocodilian species. Because the American alligator is listed partly due to the potential threat to its survival based on previous population declines that have been reversed in most parts of its range in the United States, the Service must determine that allowing exports and thereby stimulating harvest will not be detrimental to the survival of the species itself.

The U.S. Scientific Authority must develop advice on nondetriment for the export of Appendix II species in accordance with Section 8A of the Endangered Species Act (Act) of 1973, as amended. The Act states that the Secretary of the Interior, ''shall base such determinations and advice given by him under Article IV of the CITES with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.''

Guidelines developed for Scientific Authority advice on exports of American alligator under provisions of CITES Article II.2(a), are summarized as follows:

A. Minimum requirements for biological information:

(1) The condition of the population, including trends (the method of determination to be a matter of State choice) and population estimates where such information is available;